



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2004

Ms. Amy L Sims
City of Lubbock
P. O. Box 2000
Lubbock, Texas 79457

OR2004-10582

Dear Ms. Sims:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 214795.

The City of Lubbock (the "city") received a request for "all health care insurance vendor proposals and rates from [the city's] health care bid process within the last two years." You claim that the requested information may be excepted from disclosure under sections 552.101 and 552.110, but make no arguments and take no position as to whether the information is so excepted from disclosure. Further, you state that the request may implicate third party privacy or proprietary interests. Accordingly, you indicate and provide documentation showing that you notified fourteen interested third parties of the request pursuant to section 552.305 of the Government Code and of each party's right to submit arguments explaining why the information concerning it should not be released.¹ *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information.

¹The third parties that received notice pursuant to section 552.305 are the following: Conexis Benefits Administrators, L.P. d/b/a CompLink("Conexis"); PharmaCare ("PharmaCare/Eckerd"); HealthSmart/ICON ("ICON"); WHP Health Initiatives, Inc. d/b/a Walgreens Health Initiatives ("Walgreens"); the EPOCH Group, L.C. ("EPOCH"); National Pacific Dental Insurance ("NPDI"); SHA, L.L.C. d/b/a First Care ("First Care"), Southwest Life & Health Insurance Company; Scott & White Prescription Services ("Scott & White"); Humana Dental ("Humana"); CBCA; Leggett Actuaries, Inc. ("Leggett"); United Concordia; Blue Cross and Blue Shield of Texas ("Blue Cross"); and TML.

As a preliminary matter, we note that this office previously issued Open Records Letter Nos. 2003-8611 (2003) and 2003-1563 (2003) in response to two requests for a decision concerning some of the same information at issue in the current request. In Open Records Letter No. 2003-1563, we concluded the city had to withhold some of the submitted information related to clinical and pricing information of PharmaCare/Eckerd. In Open Records Letter No. 2003-8611, we concluded that some of the submitted information related to CBCA, TML, Blue Cross, ICON, and First Care was excepted from disclosure, and some of the information was required to be released. You do not indicate that the relevant facts and circumstances regarding PharmaCare/Eckerd, CBCA, TML, Blue Cross, ICON, and First Care have changed since the issuance of the prior rulings. Accordingly, we determine the city must continue to follow those rulings as previous determinations with respect to the submitted information of CBCA, TML, Blue Cross, ICON, and First Care, and with respect to the clinical and pricing information of PharmaCare. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) records or information at issue are precisely same records or information previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) governmental body which received request for records or information is same governmental body that previously requested and received ruling from attorney general; 3) prior ruling concluded that precise records or information are or are not excepted from disclosure under Act; and 4) law, facts, and circumstances on which prior ruling was based have not changed since issuance of ruling).

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, EPOCH, NPDI, Scott & White, Humana, Leggette, and United Concordia have not submitted comments to this office in response to the section 552.305 notice. Therefore, these companies have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, information pertaining to these companies may not be withheld from disclosure under section 552.110 of the Government Code.

Conexis claims that some of its information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Although Conexis raises section 552.101, it does not provide any arguments to demonstrate that the information it seeks to withhold is confidential by law. Additionally, we are not aware of any provision of law that makes this information confidential. Therefore, the city may not withhold any information pertaining to Conexis under section 552.101.

PharmaCare/Eckerd raises section 552.101 of the Government Code in conjunction with the common law right to privacy.² Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). The submitted information pertaining to PharmaCare/Eckerd does not contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person. Therefore, none of the information at issue is confidential under common law privacy, and the city may not withhold any of PharmaCare/Eckerd's information under section 552.101 on that ground.

Walgreens asserts that information pertaining to it is excepted from public disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See id.* at 8-9. The city does not argue that the release of any of the submitted information would harm the city's interests in a particular competitive situation. Therefore, no portion of the submitted information pertaining to Walgreens is excepted from disclosure under section 552.104 of the Government Code.

Conexis, Walgreens, and PharmaCare/Eckerd also contend that portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

²Section 552.101 also encompasses the doctrine of common law privacy.

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the submitted information and the arguments submitted by Conexis, PharmaCare/Eckerd, and Walgreens, we find that each has made a *prima facie* case that portions of the information that each company seeks to withhold are protected as trade secrets. Moreover, we have received no arguments that would rebut these claims as a matter of law. Thus, we have marked the portions of the information at issue that the city must withhold pursuant to section 552.110(a).

We find that Conexis and Walgreens have made specific factual or evidentiary showings that the release of some of the information each seeks to withhold would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). Further, we find that Conexis, PharmaCare/Eckerd, and Walgreens have not shown that any of the remaining information each seeks to withhold meets the definition of a trade secret or that its release would cause that company substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov’t Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, the remaining information pertaining to these companies may not be withheld pursuant to section 552.110.

We note that the remaining submitted records contain information that is subject to section 552.136 of the Government Code. Section 552.136 provides in relevant part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or

instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the type of information that must be withheld under section 552.136.

Finally, we note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary: (1) to the extent the information at issue in the present request is identical to the information addressed in Open Records Letter Nos. 2003-8611 and 2003-1563, the city must continue to follow those rulings as previous determinations with respect to such information; (2) we have marked the portions of the information at issue that the city must withhold pursuant to section 552.110; (3) we have marked the type of information that must be withheld under section 552.136; (4) the city must release the remaining information; and (5) in releasing information that is protected by copyright, the city must comply with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

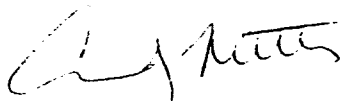
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 214795

Enc. Submitted documents

c: Mr. Scott Koenig
P. O. Box 38184
Dallas, Texas 75238-0184
(w/o enclosures)

Mr. Rich Glass
Conexis Benefits Administrators, L.P.
106 Decker Court, Suite 200
Irving, Texas 75062
(w/o enclosures)

Mr. Jeffrey W. Mittleman
Legal Counsel
PharmaCare
695 George Washington Hwy
Lincoln, Rhode Island 02865
(w/o enclosures)

Mr. Marc T. Shivers
Hughes Luce L.L.P.
111 Congress Avenue, Suite 900
Austin, Texas 78701
(w/o enclosures)

Mr. Larry D. Anderson
Walgreens Health Initiatives
MSL468
1417 Lake Cook Road
Deerfield, Illinois 60015
(w/o enclosures)

Mr. Mark Williams
The EPOCH Group, L.C.
6717 Shawnee Mission Parkway
Overland Park, Kansas 66201
(w/o enclosures)

Mr. Rick Tisch
National Pacific Dental Insurance
1445 North Loop West, Ste 500
Houston, Texas 77008
(w/o enclosures)

Mr. Chuck Walker
SHA, L.L.C. dba First Care
12940 North Highway 183
Austin, Texas 78750
(w/o enclosures)

Ms. Esther Webb
Scott & White Prescription Srvs
P. O. Box 174401
Arlington, Texas 76003
(w/o enclosures)

Mr. Christopher Childs
Humana Dental
1100 Employers Boulevard
Green Bay, Wisconsin 54344
(w/o enclosures)

Mr. Stephen McBride
CBCA
4150 International Plaza, Ste 900
Fort Worth, Texas 76109
(w/o enclosures)

Mr. David Hawkins
Leggette Actuaries, Inc.
4131 North Central Expressway #1100
Dallas, Texas 75204
(w/o enclosures)

Mr. Craig Martin
United Concordia
8214 Westchester Drive, Ste 820
Dallas, Texas 75225
(w/o enclosures)

Ms. Lois Doan
Blue Cross and Blue Shield of Texas
901 South Central Expressway
Richardson, Texas 75080
(w/o enclosures)

Ms. Susan Smith
TML
1821 Rutherford Lane, Ste 300
Austin, Texas 78754-5151
(w/o enclosures)